

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re
CONTINENTAL COIN
CORPORATION,

Debtor.

No. CV 08-0093 (PA)
No. CV 08-1478 (PA)
No. CV 08-2504 (PA) ✓

Bankruptcy Court Case No.
1:00-bk-15821-GM

OPINION AFFIRMING BANKRUPTCY
COURT ORDERS

NANCY HOFFMEIER ZAMORA,
CHAPTER 11 TRUSTEE,

Appellant,

v.

ROGER VIRTUE,

Appellee.

Before the Court are appeals and a cross-appeal from Orders entered by the United States Bankruptcy Court for the Central District of California (“bankruptcy court”) on December 12, 2007 and January 31, 2008. Chapter 11 Trustee Nancy Hoffmeier Zamora (“Trustee”) and creditor Roger Virtue (“Virtue”) filed these appeals in three cases (Case Nos. CV 08-0093; 08-1478; 08-2504). Because all three appeals seek review of the same two Bankruptcy Orders, the Court consolidated them under Case No. 08-0093. (See Nov. 7,

2008 Order.) Pursuant to Federal Rule of Civil Procedure 78, Local Rule 7-15, and Federal Rule of Bankruptcy Procedure 8012, the Court finds that this matter is appropriate for decision without oral argument.

I. FACTUAL & PROCEDURAL BACKGROUND

On July 19, 2000, Continental Coin Corporation (“Debtor”) filed a voluntary petition under Chapter 11 of the Bankruptcy Code. (Excerpts of Record (“ER”) 46–47.) The Debtor owned and operated a retail store (“Retail Store”) that sold precious gems, jewelry, numismatic coins, gold bullion, precious metals and collectibles, and exchanged foreign currency. It also owned a mint facility (“Mint”) that made decorative and commemorative coins, refined precious metals, and subleased office and retail space to approximately eighteen subtenants.^{1/}

On August 31, 2001, the Trustee was appointed. (ER 632–42.) The Trustee commenced selling the estate’s assets and satisfying claims. She sold the Ground Leases and the Mint equipment on May 11, 2004. (ER 1122–24.)

Virtue is one of the Debtor’s creditors. (ER 2237.) He contends that the Trustee improperly liquidated the estate. On July 31, 2007, Virtue filed a motion for leave to sue the Trustee and her counsel (ER 2208–2387). Virtue alleged that the Trustee failed to: (1) give notice of her intent to assume the leases for the Mint and Retail facilities (ER 2392); (2) hire brokers to assist with the sale or valuation of the leases, equipment, machinery and personal property (ER 2394); (3); accept reasonable offers for the leases and property, thus causing a significant loss for the estate (ER 2394–2401); and (4) respond to Virtue’s requests for information (ER 2401–2402). Virtue sought recovery from the Trustee and her counsel based on the legal theories of breach of fiduciary duty, gross negligence, negligence, and legal malpractice. (ER 2402–2406.)

^{1/} The Debtor owned the leases for the Retail Store, Mint, and office space (“Ground Leases”). (ER 797–821, 853–865, 1976, 2033.)

On December 12, 2007, the bankruptcy court held that the Trustee was entitled to quasi-judicial immunity for negligence, but that Virtue could pursue his claims against the Trustee for gross negligence and for breach of fiduciary duty.^{2/} (ER 2753.)

On December 21, 2007, the Trustee appealed. (ER 2767–2773.) On the same day, Virtue filed a motion to modify the order. He sought a determination that the Trustee could be held liable for the negligent violation of her statutory duties and that he could sue the Trustee’s counsel. (ER 2774–2836.) On December 28, 2007, Virtue filed his complaint against the Trustee and her counsel.^{3/} (ER 2837–2860.) On January 8, 2008, the Trustee filed a motion to stay the December 12, 2007 Order and the adversary proceeding. (ER 2933–2942.) On January 31, 2008, the bankruptcy court denied Virtue’s motion and granted the Trustee’s motion for a stay.^{4/} (ER 3056–3066.)

II. STANDARD OF REVIEW

The bankruptcy court’s findings of fact are reviewed for clear error, and conclusions of law are reviewed de novo. Sousa v. Miguel (In re U.S. Trustee), 32 F.3d 1370, 1372 (9th Cir. 1994); Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162,

^{2/} It prohibited Virtue from filing a complaint alleging self-dealing or breaches of the duty of loyalty, as no such allegations had been brought in the proposed complaint lodged with the motion. (ER 2753.) It also prohibited Virtue from pursuing claims related to the Trustee’s failure to move to set aside the assumption of the Ground Leases or failure to hire a real estate broker, both of which the bankruptcy court found to fall under the “business judgment rule.” (ER 2753.) Additionally, the bankruptcy court held that Virtue could not sue the Trustee’s attorneys because her attorneys owe no statutory or fiduciary duty to the creditors of the estate, and Virtue lacked standing to assert a malpractice claim. (ER 2751.) Finally, the bankruptcy court held that Virtue could not hire his own attorneys to represent the estate in a suit against the Trustee, and that he was not entitled to prior approval of an administrative expense to pay his attorneys out of the estate. (ER 2752.)

^{3/} The bankruptcy court construed Virtue’s motion to modify as a motion for reconsideration.

^{4/} The court also denied Virtue’s request to conduct discovery and to require the Trustee and her counsel to post a bond as a condition of the stay. (ER 3056–3066.) On February 5, 2008, Virtue filed his notice of appeal of both the December 12, 2007 and January 31, 2008 Orders. On February 8, 2008, the Trustee filed an amended notice of appeal and notice of cross-appeal. (ER 3068–3116.)

1 1166 (9th Cir. 1990); Fed. R. Bankr. Proc. 8013; see also Curry v. Castillo (In re Castillo),
 2 297 F.3d 940, 946 (9th Cir. 2002) (“The bankruptcy court’s conclusions of law regarding the
 3 immunity of . . . a trustee are reviewed de novo, while findings of fact are reviewed for clear
 4 error.”). Bankruptcy court’s rulings on motions to stay or motions to require posting of a
 5 bond are reviewed for abuse of discretion. In re Irwin, 338 B.R. 839, 844 (E.D. Cal. 2006)
 6 (stay reviewed for abuse of discretion); In re Swift Aire Lines, Inc., 21 B.R. 12, 14–16 (9th
 7 Cir. BAP 1982) (requiring bond is discretionary).

8 **III. ANALYSIS**

9 **A. Quasi-Judicial Immunity**

10 The Trustee argues that she is entitled to absolute quasi-judicial immunity for any
 11 claim based on her decisions of how and when to sell the estate’s assets. The bankruptcy
 12 court held that the Trustee was entitled to quasi-judicial immunity for negligence, but that
 13 immunity did not extend to grossly negligent or willful conduct.

14 Judicial immunity insulates judges from suit for adjudicative acts. Forrester v. White,
 15 484 U.S. 219, 225–28, 108 S. Ct. 538, 543–545, 98 L. Ed. 2d 555 (1988). This immunity “is
 16 not reserved solely for judges, but extends to nonjudicial officers for ‘all claims relating to
 17 the exercise of judicial functions[,]’” through the doctrine of quasi-judicial immunity.
 18 Castillo, 297 F.3d at 947 (quoting Burns v. Reed, 500 U.S. 478, 499, 111 S. Ct. 1934, 114 L.
 19 Ed. 2d 547 (1991) (Scalia, J., concurring in part and dissenting in part)). In Antoine v.
 20 Byers & Anderson, Inc., 508 U.S. 429, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993), the
 21 United States Supreme Court established a two-part test for determining if a non-judicial
 22 officer is entitled to quasi-judicial immunity. First, a court must undertake “a considered
 23 inquiry into the immunity historically accorded the relevant official at common law and the
 24 interest behind it.” Id. at 432, 113 S. Ct. at 2170. Second, a court must consider whether a
 25 judge, if performing the particular action at issue, would be entitled to absolute immunity.
 26 Id. at 435, 113 S. Ct. at 2171. Under the second prong, “the touchstone for the doctrine’s
 27 applicability has been performance of the function of resolving disputes between parties, or
 28 of authoritatively adjudicating private rights.” Id. at 435–36, 113 S. Ct. at 2171 (internal

1 quotations and citations omitted). Thus, “[w]hen judicial immunity is extended to officials
 2 other than judges, it is because their judgments are functionally comparable to those of
 3 judges — that is, because they, too, exercise a discretionary judgment as part of their
 4 function.” Id. at 436, 113 S. Ct. at 2171 (internal quotations and citations omitted).

5 Accordingly, here the Court:

6 must first inquire as to the immunity historically accorded a
 7 bankruptcy trustee at common law, during the development of
 8 the common-law doctrine of judicial immunity. We next
 9 consider whether the particular functions of the bankruptcy
 trustee at issue in this case . . . are functions involving the
 exercise of discretionary judgment.

10 Castillo, 297 F.3d at 949. The bankruptcy court characterized this test as requiring “the
 11 court to first look at the position at issue . . . to see if it is one whose functions were
 12 historically judicial in nature, and therefore was afforded immunity, and only then to
 13 determine if the particular action being taken by the individual in that position was an
 14 adjudicative function (first categorize the actor and then look at the nature of the action).”
 15 (ER 2742.) In applying this test, the bankruptcy court determined that the Trustee could
 16 invoke quasi-judicial immunity, and that such immunity extended to the actions taken here.
 17 It then analyzed the reach of quasi-judicial immunity, and determined that it extended to
 18 negligent, but not grossly negligent or willful, actions. This Court agrees.

19 1. Trustees May Invoke Quasi-Judicial Immunity

20 Under the first Antoine prong, the Court must determine whether bankruptcy trustee
 21 antecedents were historically accorded immunity. Antoine, 508 U.S. at 432, 113 S. Ct. at
 22 2170; Castillo, 297 F.3d at 949. This appears akin to a standing inquiry. In other words, the
 23 Court must determine through a historical inquiry whether a trustee has standing to assert a
 24 quasi-judicial immunity defense. The Ninth Circuit has answered this question in the
 25 affirmative:

26 Thus the common-law and nineteenth century antecedents of the
 27 modern bankruptcy trustee were entrusted with both
 28 administrative and adjudicatory functions. To the extent the
 trustee performed the functions of a modern-day bankruptcy

1 judge, immunity would have extended to the performance of
2 these common-law adjudicatory functions.

3 Castillo, 297 F.3d at 950; see also id. (“Once appointed, the standing trustee — operating
4 under the supervision of the U.S. Trustee and pursuant to legislative and judicial directives
5 — performs a wide variety of functions previously performed by bankruptcy judges.”). In
6 Castillo, the Ninth Circuit held that a trustee was entitled to quasi-judicial immunity for
7 miscalendarling, and failing to give notice of, a hearing. Castillo, 297 F.3d at 953. Here, the
8 Trustee may assert a quasi-judicial immunity defense. The Court must next inquire if such
9 immunity encompasses the Trustee’s sale of the estate’s assets.

10 2. Quasi-Judicial Immunity Extends to the Trustees’ Selling of the Estate 11 Assets

12 In Castillo, the Ninth Circuit noted that it did “not hold that all of the Trustee’s many
13 functions are covered by absolute quasi-judicial immunity.” Castillo, 297 F.3d at 957.
14 Quasi-judicial immunity extends to trustee’s actions only if they “are functionally
15 comparable to those of judges — that is, because they, too, exercise a discretionary
16 judgment as part of their function.” Antoine, 508 U.S. at 436, 113 S. Ct. at 2171. Immunity
17 covers only the actions of “resolving disputes between parties, or of authoritatively
18 adjudicating private rights.” Id.

19 Virtue argues that quasi-judicial immunity does not apply to the actions of selling
20 estate assets because those actions are administrative, and not adjudicatory, in nature.
21 (Virtue Br. 16–19.) In support of this assertion, he contends that these actions were
22 historically performed by “assignees[,]” and not the antecedents of modern bankruptcy
23 judges. (Id.) Virtue conflates the first Antoine prong with the second. While determining
24 who historically performed certain functions is relevant for ascertaining if a trustee falls into
25 a class of persons who may assert immunity, it is not clear that the historical analysis is
26 relevant to determining if a given action is adjudicatory in nature. In Antoine, the Supreme
27 Court emphasized that immunity extends to actions that are “functionally comparable” to
28 those performed by judges. Antoine, 508 U.S. at 436, 113 S. Ct. at 2171. An action is

1 “functionally comparable” if it involves the exercise of discretionary judgment. Id. If, as
2 Virtue appears to suggest, the test was merely whether a judicial officer historically
3 performed the function at issue, there would be no need to determine if the action was
4 “functionally comparable” to that historically performed by judges. In other words, under
5 Virtue’s analysis, the action would qualify for immunity if a judge actually historically
6 performed it, not if it was merely comparable to an action that judges historically performed.
7 However, the Supreme Court noted that “some tasks performed by judges themselves, ‘even
8 though they may be essential to the very functioning of the courts, have not . . . been
9 regarded as judicial acts[,]’” because they are not discretionary. Id. at 437, 113 S. Ct. at
10 2172 (quoting Forrester, 538 U.S. at 228, 108 S. Ct. at 544.). Thus, the Supreme Court
11 emphasized that under the second prong, the nature of the action is relevant, not the identity
12 of the person who historically performed it. Quasi-judicial immunity extends to a trustee’s
13 liquidation of assets if doing so involves “resolving disputes between parties, or of
14 authoritatively adjudicating private rights.” Id. at 435–36, 113 S. Ct. at 2171.

15 There can be no dispute that a trustee’s evaluation and acceptance or rejection of
16 parties’ offers to purchase estate assets involves discretionary judgment. Moreover, it
17 involves the authoritative adjudication of private rights. See Harris v. Wittman, No.
18 06cv1939, 2007 WL 2456202, at *10 (S.D. Cal. Aug. 21, 2007) (holding that “transferring
19 and selling assets of the Estate . . . are ‘essential to the authoritative adjudication of private
20 rights to the bankruptcy estate.’” (quoting Castillo, 297 F.3d at 951)). Even if historical
21 analysis is relevant under this prong, quasi-judicial immunity has been extended to actions
22 akin to evaluating and selling assets, even when such actions were not performed by judges.
23 Antoine, 508 U.S. at 433 n.8, 113 S. Ct. at 2170 n.8 (noting that quasi-judicial immunity
24 historically extended “‘to assessors upon whom is imposed the duty of valuing property for
25 the purpose of a levy of taxes; to commissioners appointed to appraise damages when
26 property is taken under the right of eminent domain; . . . and to the collector of customs in
27 exercising his authority to sell perishable property, and in fixing upon the time for notice of
28 sale.’” (quoting T. Cooley, Law of Torts 410–11 (1880)). Accordingly, like the bankruptcy

1 court, this Court concludes that quasi-judicial immunity extends to the Trustee's actions
2 here.

3 3. Quasi-Judicial Immunity Extends Only to Negligent Wrongdoing

4 While quasi-judicial immunity extends to liquidating assets, it appears to do so only
5 when a trustee's actions involve no more than negligence. Grossly negligent or willful
6 conduct is not entitled to protection.

7 In Mosser v. Darrow, 341 U.S. 267, 274–75, 71 S. Ct. 680, 683–84, 95 L. Ed. 927
8 (1951), the Supreme Court held that a reorganization trustee could be held personally liable
9 for willfully permitting his employees to trade in the debtor's subsidiaries' securities and to
10 retain the profits rather than transferring them to the estate. Likewise, in Ferrante v. Nw.
11 Nat'l Ins. Co. (In re Ferrante), 51 F.3d 1473, 1475–76, 1480 (9th Cir. 1995), the Ninth
12 Circuit held that a trustee was personally liable for willfully retaining money from the sale
13 of cars owned by the debtor, rather than using it to pay secured creditors.

14 The Ninth Circuit has also held, or stated in dicta, that trustees may be liable for
15 breaching duties involving less than willfulness. In Hall v. Perry (In re Cochise College
16 Park, Inc.), 703 F.2d 1339, 1345 (9th Cir. 1983), the Ninth Circuit considered a trustee who
17 had continued accepting payments from creditors on executory contracts that he had already
18 decided to reject. The court held that the trustee's failure to take formal steps to reject the
19 executory contracts "and thereby permit the creditor to continue to perform after the date of
20 decision to reject directly and unnecessarily injures the creditor and is not consonant with
21 conduct of an ordinarily prudent person serving the capacity of trustee. Such failure
22 therefore gives rise to a claim for damages for which the trustee is personally liable." Id. at
23 1358 (footnote omitted). The court also stated that "[a]lthough a trustee is not liable in any
24 manner for mistakes in judgment where discretion is allowed . . . he is subject to personal
25 liability for not only intentional but also negligent violations of duties imposed on him by
26 law[.]" Id. at 1357 (citations omitted); see also id. at 1357 n.26 (stating that "[w]e reject the
27 approach of the Tenth and Sixth Circuits which, in an apparent misreading of the seminal
28 case of Mosser v. Darrow, . . . have concluded that a bankruptcy or reorganization trustee

1 may be held personally liable for damages only for injuries arising from intentional — as
2 opposed to negligent — conduct. . . . Properly construed, the language quoted from Mosser
3 indicates merely that the sort of personal liability which may be imposed on a trustee for the
4 acts of his employees is not strict liability but rather liability depending at least on a showing
5 of the trustee’s own negligence; Mosser does not ‘hold’ in any sense that personal liability
6 does not obtain if such a showing of negligence is made.”).

7 Likewise, in United States v. Hemmen, 51 F.3d 883, 885–886 (9th Cir. 1995), the
8 court considered the trustee’s failure to pay a tax levy against the debtor out of his allowed
9 administrative expense claim. The court rejected the trustee’s claim for quasi-judicial
10 immunity because the trustee was aware of the levy, his failure to honor it did not arise from
11 his duty to protect the assets of the estate, and he did not raise before the bankruptcy court
12 the legal question of whether he was obligated to pay the levy. Id. at 891. The court stated
13 that “[t]rustees are not immune, however, for intentional or negligent violation of duties
14 imposed by law.” Id. (quoting Bennett v. Williams, 892 F.2d 822, 823 (9th Cir. 1989).) In
15 Bennett, the Ninth Circuit also stated that trustees are not immune for intentional or
16 negligent violations of duties, but held that the trustee was entitled to quasi-judicial
17 immunity for negligently hiring and supervising a management company when the
18 bankruptcy court had authorized the hiring and the creditor had constructive knowledge and
19 did not object. Bennett, 892 F.2d at 823–25.

20 However, in Castillo, the court extended quasi-judicial immunity to a trustee that had
21 negligently miscalendared, and failed to give notice of, a hearing. Castillo, 297 F.3d at 953.
22 The court concluded by noting that “[b]ecause we decide that Curry is entitled to immunity,
23 we need not reach Castillo’s argument that bankruptcy trustees may be liable for
24 negligence.” Id. Virtue argues that the court in Castillo never reached the issue of whether
25 quasi-judicial immunity extends to negligent actions. (Virtue Br. 23.) Virtue
26 misunderstands the holding in Castillo. There, the court expressly considered the trustee’s
27 negligent acts, and held that the trustee was entitled to quasi-judicial immunity for those
28 acts. Castillo, 297 F.3d at 953.

1 Thus, the bankruptcy court was faced with seemingly conflicting Ninth Circuit
2 precedent. On the one hand, in Cochise and Hemmen, the court held that a trustee is not
3 immune for negligent acts. On the other hand, in Bennett, the court stated in dicta that
4 trustees are not immune for negligent acts, but then ultimately extended quasi-judicial
5 immunity to the trustee's alleged negligence. Similarly, in Castillo, the court extended
6 quasi-judicial immunity for negligent acts. To resolve this conflict, the bankruptcy court
7 examined the precise nature of the acts in question in each of these cases.

8 In Cochise, the trustee violated his obligation to inform creditors that he intended to
9 reject the executory contracts the creditors had with the debtor, thus allowing them to
10 continue to pay on the contracts. 703 F.2d at 1358. The court also noted that the trustee
11 "repeatedly told [creditors] that they had to continue making payments on the promissory
12 notes to protect their rights and threatened to foreclose on the mortgaged lots if payments
13 were not made[.]" and that he then used the money received to "pay costs of administering
14 the estate, including his own trustee's fee." Id. at 1345–46. The bankruptcy court correctly
15 concluded that the action at issue in Cochise involved more than mere negligence.

16 In Hemmen, the court rejected the trustee's claim for quasi-judicial immunity because
17 the trustee was aware of the tax levy, his failure to honor it did not arise from his duty to
18 protect the assets of the estate, and he did not raise the legal question of whether he was
19 obligated to pay the levy before the bankruptcy court. Id. at 891. Virtue argues that the
20 trustee was guilty of mere negligence in Hemmen because he could reasonably have thought
21 that he had a legal basis for failing to honor the levy. (Virtue Br. 22.) However, even if the
22 trustee there thought in good faith that he had a legitimate basis not to pay the levy, he
23 consciously chose both to ignore it, and to fail to inform the bankruptcy court about it. Id.

24 In contrast, the court in Bennett merely stated in dicta that a trustee may be held
25 liable for negligence, but actually extended quasi-judicial immunity to bar liability for the
26 allegedly negligent hiring and supervision of a management company. Bennett, 892 F.2d at
27 823. Similarly, the court in Castillo extended absolute quasi-judicial immunity to the
28 trustee's negligent miscalendaring, and failure to provide notice of, a hearing. Castillo, 297

1 F.3d at 953. The acts of hiring and supervising a management company, and of
2 miscalendarizing and failing to provide notice of a hearing, were not alleged to have been
3 taken in bad faith, and thus cannot be characterized as knowing breaches of duty, as the
4 actions in Cochise and Hemmen might be. Thus, the bankruptcy court resolved the conflict
5 between Cochise, Hemmen, Bennett and Castillo by interpreting them to mean that quasi-
6 judicial immunity extends to mere negligent acts, but not to grossly negligent or willful
7 breaches of duty. As the bankruptcy court noted, other courts have similarly held that
8 immunity extends to negligent, but not grossly negligent or willful actions. See DiStefano v.
9 Stern (In re J.F.D. Enters., Inc.), 223 B.R. 610, 628 (Bankr. D. Mass. 1998) (noting that
10 gross negligence “strikes the proper balance between the difficulties of the task assumed by
11 trustees and the need to protect the interest of creditors and other parties to the bankruptcy
12 case.”). This Court agrees.

13 Virtue argues that, even if the Trustee can assert a quasi-judicial immunity
14 affirmative defense, that should not preclude him from filing suit. (Virtue Br. 20–21.)
15 However, in its Confirmation Order, the bankruptcy court expressly required that Virtue
16 obtain leave before filing suit. (ER 2197–2198.) Virtue does not challenge the bankruptcy
17 court’s authority to do this. The applicability of the Trustee’s quasi-judicial immunity
18 affirmative defense causes Virtue’s negligence claims to fail as a matter of law. The
19 bankruptcy court noted that allowing Virtue to pursue claims that are barred as a matter of
20 law “would be a waste of estate assets[.]” (ER 2734.) Accordingly, the bankruptcy court
21 did not abuse its discretion in prohibiting Virtue from filing those claims.

22 B. Business Judgment Rule

23 The bankruptcy court held that “[t]he allegations which fall under the business
24 judgment rule and [sic] are not actionable. They are not to be pursued in the complaint. As
25 currently pleaded this would include the issues of failing to set aside the assumption of the
26 ground leases or to hire a real estate broker.” (ER 2753.) The parties argue at length about
27 the application of the “business judgment rule.” In Bennett, the Ninth Circuit noted that it
28 has “consistently held that liability will not be imposed for mistakes in business judgment.”

1 Bennett, 892 F.2d at 824 (citing Southwestern Media Inc. v. Rau, 708 F.2d 419 (9th Cir.
2 1983); Cochise, 703 F.2d at 1357). It further stated that it “is deferential to the business
3 decisions of a bankruptcy trustee and [has] held trustees immune from collateral attack for
4 acts of mismanagement when the trustee was acting within his court authorization.” Id.
5 (citing Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986);
6 Southwestern, 708 F.2d at 425). In Cochise, the court stated that “a trustee is not liable in
7 any manner for mistakes in business judgment where discretion is allowed[.]” Cochise, 703
8 F.2d at 1357.

9 Thus, the “business judgment rule” appears to offer a trustee immunity for her
10 business decisions made in the scope of her authority, and with court approval. It is unclear
11 what, if any, difference exists between the business judgment rule and quasi-judicial
12 immunity. Indeed, in both Bennett and Lonneker, the court discussed the business judgment
13 rule and then held that the trustee was entitled to quasi-judicial immunity. Bennett, 892 F.2d
14 at 825; Lonneker, 804 F.2d at 1097; see also Southwestern, 708 F.2d at 425 (holding that
15 “[t]he [trustee’s] decision concerning the form of sale [of estate assets free and clear of lien]
16 therefore rested within the business judgment of the trustee. Liability will not be imposed
17 for the exercise of such judgment, absent negligence.” (citations omitted)).

18 Virtue asserts that many of the Trustee’s actions are so egregious that the business
19 judgment rule does not apply. However, Virtue provides no argument or evidence to
20 demonstrate that the specific actions here — the Trustee’s failure to set aside the assumption
21 of the Ground Leases and to hire a real estate broker — fall outside the business judgment
22 rule. Accordingly, Virtue fails to demonstrate that the bankruptcy court erred in holding that
23 these claims are not actionable.

24 C. The Bankruptcy Court Properly Allowed Virtue to File an Amended
25 Complaint

26 The Trustee argues that the bankruptcy court erred as a matter of law by allowing
27 Virtue to file an amended complaint alleging gross negligence because doing so violated its
28 Confirmation Order. (Trustee’s Br. 16–17.) The Trustee offers no legal authority for this

1 argument. Moreover, even if a bankruptcy court could be held to have abused its discretion
 2 for modifying its own order, the Trustee's argument is a non-sequitur. The Confirmation
 3 Order required that Virtue file a request for leave to sue the Trustee and the Trustee's
 4 counsel no later than July 31, 2007. (ER 2197–2198.) Virtue filed his request for leave to
 5 file a complaint by the deadline, and the bankruptcy court's decision to allow Virtue to file
 6 an amended complaint does not contradict any part of the Confirmation Order.

7 D. The Bankruptcy Court Properly Held That Virtue May Not Sue the Trustee's
 8 Counsel

9 Virtue argues that he is entitled to sue the Trustee's counsel. The bankruptcy court
 10 concluded otherwise because the Trustee's counsel owed no duty to creditors. This Court
 11 agrees. A trustee's counsel owes no fiduciary duty to creditors. Wolf v. Kupetz (In re Wolf
 12 & Vine, Inc.), 118 B.R. 761, 771 (Bankr. C.D. Cal. 1990). Moreover, because no attorney-
 13 client relationship exists between Virtue and the Trustee's counsel, Virtue lacks standing to
 14 sue the Trustee's counsel for malpractice. In California, legal malpractice claims cannot be
 15 assigned. Kracht v. Perrin, Gartland & Doyle, 219 Cal. App. 3d 1019, 1022–23, 268 Cal.
 16 Rptr. 637 (1990).

17 Virtue concedes that “[i]n this case, only the Trustee has standing to sue herself and
 18 to sue her counsel on behalf of the estate.” (Virtue Br. 28 (emphasis in original).) However,
 19 Virtue argues that courts have discretion to authorize creditors in a Chapter 11 case to sue on
 20 behalf of the estate when a debtor in possession, or a trustee, is unwilling or economically
 21 unable to do so. See, e.g., Hansen v. Finn (In re Curry and Sorensen, Inc.), 57 B.R. 824, 828
 22 (B.A.P. 9th Cir. 1986) (creditor may “petition the court to . . . gain court permission to
 23 institute the action itself.”). By analogy, Virtue argues that the bankruptcy court should
 24 have allowed him to sue the Trustee's counsel on behalf of the estate because the Trustee's
 25 attorney-client agreement, and any claims against counsel arising out of it, are assets of the
 26 estate.

27 However, the Trustee's attorneys' “attorney-client relationship only exists with the
 28 trustee, so the trustee is the only one to whom a fiduciary duty is owed.” In re Bay Area

1 Material Handling, Inc., No. 95–01903, 1995 WL 747954, at *7 (N.D. Cal. Dec. 6, 1995);
2 11 U.S.C. § 327(a) (trustee may employ attorney to “represent or assist the trustee in
3 carrying out the trustee’s duties under this title”) (emphasis added). The Trustee’s counsel
4 are not the estate’s counsel, and therefore owe no such duty to the estate. Id. Nor are the
5 Trustee’s counsel also the Debtor’s counsel, against whom the estate might have a claim if
6 the Debtor’s counsel harmed the Debtor. See, e.g., Smith v. Arthur Andersen, LLP, 421
7 F.3d 989, 1002 (9th Cir. 2005) (noting that a trustee may sue debtor’s officers and counsel
8 for malpractice for damages inflicted upon the debtor). Virtue presents no authority to the
9 contrary. Consequently, even if Virtue could bring a claim on behalf of the estate, the estate
10 appears to lack standing to bring a claim against the Trustee’s counsel. Therefore, the
11 bankruptcy court did not err in holding that Virtue could not sue the Trustee’s counsel.

12 E. Virtue May Not Hire His Own Counsel on Behalf of the Estate

13 Virtue asserts that, pursuant to 11 U.S.C. § 327(e), he should have been allowed to
14 hire his own counsel and receive pre-approval to be reimbursed from the estate. However,
15 § 327(e) provides that a trustee, using administrative funds from the estate with court
16 approval, “may employ, for a specified special purpose, other than to represent the trustee in
17 conducting the case, an attorney that has represented the debtor[.]” It provides no basis for a
18 creditor to hire an attorney on behalf of the estate. Virtue argues that, because the Trustee
19 has a conflict of interest in suing herself and her counsel (she is represented by a law firm of
20 which she is a member), he should have been permitted to hire his own attorney to sue them,
21 and to be reimbursed from the estate. However, § 327(e) does not support Virtue’s position.
22 As the bankruptcy court noted, Virtue may use his own funds and attorneys to bring his
23 claims against the Trustee, and may later seek reimbursement pursuant to 11 U.S.C. §
24 503(b)(3)(D) for having made a substantial contribution to the estate. (ER 2752.)

25 F. The Bankruptcy Court Properly Stayed the Action and Denied Discovery

26 Virtue argues that the bankruptcy court erred in staying his action pending appeal.
27 Stays that do not involve a money judgment are discretionary, and “[w]hen a bankruptcy
28 court has ruled on the issue of a stay of its order pending appeal, the district court, sitting as

1 an appellate court, reviews that decision for abuse of discretion.” In re Irwin, 338 B.R. at
 2 844 (quoting Universal Life Church v. United States, 191 B.R. 433, 444 (E.D. Cal. 1995));
 3 In re Wymer, 5 B.R. 802, 804 (9th Cir. BAP 1980) (same). “Discretion will be found to
 4 have been abused when the judicial action is arbitrary, fanciful or unreasonable which is
 5 another way of saying that discretion is abused only where no reasonable man would take
 6 the view adopted by the trial court.” In re Irwin, 338 B.R. at 844 (quoting In re Blackwell,
 7 162 B.R. 117, 119 (E.D. Pa. 1993)).

8 Under Federal Rule of Bankruptcy Procedure 8005, “the bankruptcy judge may
 9 suspend or order the continuation of other proceedings in the case under the Code or make
 10 any other appropriate order during the pendency of an appeal on such terms as will protect
 11 the rights of all parties in interest.” As Virtue notes, the court in In re Irwin stated that
 12 “[a]n appellant seeking a discretionary stay pending appeal under Bankruptcy Rule 8005
 13 must prove: (1) appellant is likely to succeed on the merits of the appeal; (2) appellant will
 14 suffer irreparable injury; (3) no substantial harm will come to appellee; and (4) the stay will
 15 do no harm to the public interest.” In re Irwin, 338 B.R. at 843 (quoting Universal Life
 16 Church, 191 B.R. at 444). While the moving party has the burden of establishing these
 17 elements, id., a bankruptcy court may also issue a stay sua sponte under Rule 8005, In re
 18 Ewell, 958 F.2d 276, 279 (9th Cir. 1992). Accordingly, the failure of the moving party to
 19 meet its burden will not preclude a bankruptcy court from issuing a stay. Moreover, some
 20 authority suggests that the four factor test for a stay may not be appropriate in all
 21 circumstances, and need not be applied rigidly. In re Gleasman, 111 B.R. 595, 599–600
 22 (Bankr. W.D. Tex. 1990). Bankruptcy courts should primarily consider the administration
 23 of the bankruptcy case. Id. at 599.

24 Here, the bankruptcy court noted that Ninth Circuit law is unsettled as to the
 25 Trustee’s quasi-judicial immunity, but that the Trustee at least has a colorable chance of
 26 prevailing. (ER 3062.) It also found that, without a stay, the Trustee would be harmed by
 27 the cost of litigating claims that may turn out to be non-cognizable as a matter of law. (ER
 28 3063.) While litigation costs may not constitute irreparable harm, Renegotiation Bd. v.

1 Bannercraft Clothing Co., 415 U.S. 1, 24, 94 S. Ct. 1028, 1040, 39 L. Ed. 2d 123 (1974), the
2 bankruptcy court found that allowing Virtue's case to proceed would alter the status quo and
3 harm administration of the bankruptcy case. (ER 3063.) Moreover, the litigation costs
4 would not be borne by the Trustee alone, but would also lead to diminution of the estate and
5 adversely affect distribution to other creditors. (ER 3063.) The bankruptcy court also found
6 that Virtue would not be harmed by the stay because there is no danger of destruction of
7 evidence since the Trustee is an officer of the court and is obligated to retain such evidence.
8 (ER 3063.) Finally, the bankruptcy court found that a stay was in the public interest because
9 "going forward with the merits of the case while an appeal is pending on the very question
10 of what is actionable . . . would be a serious waste of time, money, and judicial resources.
11 Therefore, granting a stay pending appeal will best preserve the status quo and serve to
12 prevent irreparable harm to the trustee and to the estate[.]" (ER 3064.) The Court
13 concludes that a "reasonable man [c]ould take the view adopted by the [bankruptcy court]."
14 In re Irwin, 338 B.R. at 844. Therefore, the bankruptcy court did not abuse its discretion in
15 issuing the stay.

16 Relatedly, the bankruptcy court denied Virtue's request to conduct discovery pending
17 appeal. (ER 3064–3065.) It found that, because there is little risk of evidence being lost or
18 destroyed, but there is a significant risk that some of the claims for which Virtue hopes to
19 conduct discovery will fail as a matter of law, it was unnecessary to proceed with discovery,
20 though the parties could agree to do so if desired. (ER 3065.) The bankruptcy court did not
21 abuse its discretion in reaching that decision.

22 G. The Bankruptcy Court Properly Held That the Trustee Need Not Post a Bond

23 The bankruptcy court also denied Virtue's request that the Trustee post a bond as a
24 condition of the stay. (ER 3064.) A bankruptcy court issuing a stay under Rule 8005 need
25 not require the posting of a bond, In re Byrd, 172 B.R. 970, 974 (Bankr. W.D. Wash. 1994),
26 and its decision whether or not to require a bond is reviewed for abuse of discretion, In re
27 Swift Aire Lines, Inc., 21 B.R. at 14–16 (stating that court abuses its discretion when
28 refusing to approve supersedeas bond when stay as a matter of right exists for appeal from

1 money judgment, but implying that bonds in other cases are discretionary). Here, the
2 bankruptcy court denied Virtue's request that the Trustee post a bond because the Trustee is
3 already bonded and there is no indication that a future judgment would be uncollectible.
4 (ER 3064.) The Court finds that the bankruptcy court did not abuse its discretion in denying
5 Virtue's request that the Trustee post a bond.


6 H. The Bankruptcy Court Properly Denied Virtue's Motion for Reconsideration

7 Virtue sought to have the bankruptcy court modify its December 12, 2007 Order to
8 allow Virtue to file his complaint alleging all claims, including negligence, thus forcing the
9 Trustee to file a motion to dismiss. (ER 2774–3834.) The bankruptcy court construed this
10 as a motion for reconsideration, and denied it as an impermissible attempt to change the
11 procedural posture of the case. (ER 3065.) The Trustee argues that Virtue's motion to
12 modify simply reiterated the same argument he presented in his motion for leave to file a
13 complaint, which the bankruptcy court rejected in its December 12, 2007 Order. Virtue
14 therefore provided no new basis for the bankruptcy court to reconsider or modify its order.
15 (Trustee Br. 30.) Virtue does not address this issue in his briefing. Accordingly, the
16 bankruptcy court's decision on this issue is affirmed.

17 **CONCLUSION**

18 For all the foregoing reasons, the bankruptcy court's December 12, 2007 and January
19 31, 2008 Orders are affirmed.

20 DATED: August 21, 2009

21
22 
23 _____
24 Percy Anderson
25 UNITED STATES DISTRICT JUDGE
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